No. 09-767

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SKF USA INC.,

Petitioner,

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, UNITED STATES INTERNATIONAL TRADE COMMISSION, TIMKEN U.S. CORPORATION, THE UNITED STATES, JAYSON P. AHERN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND SHARA L. ARANOFF, CHAIRMAN, UNITED STATES INTERNATIONAL TRADE COMMISSION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF ASHLEY FURNITURE INDUSTRIES INC., STANDARD FURNITURE MANUFACTURING CO., INC., ORLEANS FURNITURE, INC., AND KIMBALL FURNITURE GROUP, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are American furniture producers that have been denied distributions of antidumping duties collected pursuant to the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), because of their failure to support the petition leading to the imposition of antidumping duties upon Chinese wooden bedroom furniture. Amici have filed suit in the Court of International Trade challenging the constitutionality of that restriction under the First and Fifth Amendments. Those suits have been stayed pending the disposition of this case. Amici have a significant interest in the question presented by petitioner, as the Court's disposition of the petition may determine the outcome of amici's pending litigation.

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondents received timely notice of amici's intent to file this brief and have consented to its filing in letters on file with the Court.

SUMMARY OF ARGUMENT

The petition in this case presents an issue of lasting significance to a great many industries, including American furniture manufacturers. The hundreds of millions of dollars at stake not only have immediate consequences for the financial health of companies employing thousands of workers, but will effect the competitive position of companies within the industry for decades to come as those receiving the distributions are given an opportunity to invest in technologies and in their workers that has been denied to others solely on the basis of their speech.

In recent years, the American furniture manufacturing industry has been engaged in a rigorous debate over the best way to respond to the increasing competitive pressures of globalization. Some have sought barriers to the importation of low-cost imports from abroad, including by bringing or supporting a petition to impose antidumping duties on wooden bedroom furniture imported from China. Others have resisted protectionist impulses and attempted instead to strike a balance by importing some of the furniture they sell (or furniture components) from overseas while continuing to manufacture other products here in the United States. While facing the same pressure from Chinese imports, many domestic furniture companies concluded that the risks and costs of pursuing antidumping duties – including the risk of triggering a trade war and the possibility of reducing overall demand for furniture from all sources by increasing the cost of imported furniture and components – was greater than any likely benefit. As a result, even

though willing to fully cooperate with the Government's antidumping investigation, and even though suffering comparable injuries from the unlawful imports, some companies nonetheless declined to support the antidumping petition.

That exercise of core political speech is punished by the Byrd Amendment in a way that chills public debate on one of the great economic and political questions of our times. How best to respond to the pressures of globalization is a perennial topic of debate, protest, and legislation. The Byrd Amendment rewards those taking one view of the question – those supporting the Government's ultimate decision to impose antidumping duties – with the effect of not only denying a benefit to those who disagree with that decision, but also imposing an affirmative harm on the dissenters by subsidizing their competitors.

The court of appeals wrongly refused to subject that viewpoint discrimination to strict scrutiny. The court also erred in concluding that disagreement with the Government's antidumping decision could be used as a proxy for measuring the degree of assistance provided to the Government's investigation. In fact, in the Chinese wooden bedroom furniture investigation, amici and other dissenters provided as much, and sometimes more, information to the International Trade Commission, as did those who were given Byrd distributions. Nor, contrary to the Government's assertion below, could Congress have concluded that disagreement with the imposition of antidumping duties indicates that the dissenters were harmed less by the unlawful trade practice than those who expressed public support for

the Government policy. As described already, those harmed by unfairly priced imports could have any number of legitimate reasons for declining to support an antidumping petition.

Finally, the fact that the Byrd Amendment has been repealed should not shelter the court of appeals' erroneous and harmful decision. This Court has frequently granted certiorari to decide questions relating to repealed statutes when the legislation has significant and continuing consequences. The Court should do so again here.

ARGUMENT

I. The Petition Presents A Question Of Exceptional And Lasting Importance To The Domestic Furniture-Making Industry.

The petition in this case raises an issue of great importance to amici and other American producers of wooden bedroom furniture, affecting the distribution of millions of dollars in antidumping duties that will have a profound effect on the financial health and competitive position of companies within an industry that employs tens of thousands of American workers. The harmful effects of the decision below will continue to be felt long after the repeal of the Byrd Amendment and can only be remedied by this Court.

A. Background Of Chinese Wooden Bedroom Furniture Antidumping Duties

In October, 2003, a group of American furniture manufacturers and labor unions filed a petition with the International Trade Commission (ITC) and

Department of Commerce alleging that Chinese companies were dumping wooden bedroom furniture at less than fair value into United States' markets and that the domestic industry was being injured as a result. *See* U.S. International Trade Commission, *Wooden Bedroom Furniture from China* 1, Investigation No. 731-TS-1058 (Dec. 2004) (ITC Report).[2]

While the Commerce Department investigated whether Chinese imports were being sold at less than fair value, the ITC inquired whether the alleged dumping was materially injuring the domestic industry. As part of its investigation, the ITC sent domestic firms a questionnaire. Of the companies responding, 38 supported the petition, nine opposed it, and seven took no position. *Id.* at 17-18. While the companies supporting the petition were more numerous, they accounted for a little more than one-third of the domestic production; those opposing or taking no position on the petition accounted for the other approximately two-thirds of domestic production. *Id.*[3] Even those who opposed the petition or took no position actively participated in the investigation, providing the ITC with voluminous

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[2] A public version of the report, with certain proprietary information redacted, is available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2003/wooden_bedroom_furniture/final/PDF/woodenbedroomfurniturefinal.pdf.

[3] These figures measure domestic production by number of pieces of furniture shipped. *Id.* Measured by value, those supporting the petition accounted for roughly half of domestic production. *Id.*

data critical to its determination. *See, e.g., id.* at III-2 – 5 (breaking down responses by firms' position on petition).

At the conclusion of their respective investigations, the Department of Commerce found that Chinese companies were, in fact, dumping wooden bedroom furniture into United States' markets, and the ITC found that the dumping was causing an injury to domestic producers. *See* Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China, 70 Fed. Reg. 329 (Jan. 4, 2005). The Government accordingly imposed, and then began to collect, antidumping duties for distribution to domestic companies in accordance with the Byrd Amendment.

Although the ITC obtained substantial assistance from domestic furniture producers who supported, opposed, or took no position on the investigation, it was constrained by law to designate only those who expressed public support for the petition as eligible to receive Byrd distributions. *See* 19 U.S.C. § 1675c(d)(1) (2006). Amici subsequently challenged the ITC's failure to designate them as eligible for Byrd distributions through complaints filed in the U.S. Court of International Trade. The litigation in each of these cases has been stayed pending, ultimately, the disposition of the petition in this case.

B. The Financial Penalty Imposed On Amici Because Of Their Speech Is Significant And Will Have Lasting Consequences.

The petition in this case presents a question of critical importance to the domestic furniture manufacturing industry, both because of the magnitude of the funding at stake and because of its long-lasting competitive consequences.

1. The total amount of antidumping duties liquidated on Chinese wooden bedroom furniture, subject to distribution under the Byrd Amendment, since the duties took effect in 2005, is approximately a quarter of a billion dollars.[4] In 2009 alone, the Government allocated more than $65 million to eligible domestic furniture manufacturers. *See* U.S. Customs and Border Protection, *FY 2009 CDSOA Annual Disbursement Report* 123 (FY 2009 CDSOA Disbursement Report).[5]

To put these figures in perspective, the $65 million available for distribution is significantly more than the entire industry's operating income in 2003.

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[4] The Government's annual disbursement reports for fiscal years 2001 through 2009 are available at http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/.

[5] *Available at* http://www.customs.gov/linkhandler/cgov/trade/priority_trade/add_cvd/cont_dump/cdsoa_09/report/disbursement.ctt/disbursement.pdf. The Government distributed approximately $27 million and withheld about $37 million pending the resolution of amici's challenges to the constitutionality of the Act. *Id.*

ITC Report 25. On the level of individual firms, Stanley Furniture Company is slated to receive nearly $7.5 million for FY 2009. *See* FY 2009 CDSOA Disbursement Report at 123. That is approximately twice its reported net income for 2008. *See* Stanley Furniture Co., Inc., *Annual Report to the Securities and Exchange Commission* 11 (Feb. 2, 2009) (Stanley 2008 Report).[6] In fact, in 2008, Stanley's actual sales generated an operating loss of $3.8 million. *Id.* It was only because the company received nearly $11.5 million in CDSOA payments that it was able to report a positive net income that year. *Id.*

2. Although the Byrd Amendment has now been repealed, distributions will continue under the statute for some time to come, and the competitive effects of its unconstitutional viewpoint discrimination will be felt within the domestic furniture production industry for years.

The Government is presently withholding more than $137 million in Byrd distributions for the domestic wooden bedroom furniture industry pending the conclusion of the various cases challenging the constitutionality of the Act.[7] Although the statute was repealed in 2005, duties collected on merchandise entering the United States before October 1, 2007 will still be distributed in accordance with the Byrd Amendment. *See* Pub. L. No. 109-171, Title VII, § 7601(a), 120 Stat. 4, 154 (2006).

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[6] *Available at* http://www.stanleyfurniture.com/media/document/10k020209FINAL.pdf

[7] *See* reports cited in fn. 5, *supra*.

Moreover, as the Government recently explained, duties collected prior to October 2007 are not available for distribution "until the entry is liquidated pursuant to the direction of the Department of Commerce and the duty is collected and deposited into the special account." Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 74 Fed. Reg. 25,814, 25,814 (May 29, 2009). The process for liquidating duties previously assessed, and litigating any resulting challenges, can take years. As a result, the Government anticipates that "the distribution process will be continued for an undetermined period." *Id.*

Moreover, the effects of the Byrd Amendment's unconstitutional preference for those expressing public support for the Government's imposition of duties will last far longer. The hundreds of millions of dollars already distributed have given amici's competitors a significant competitive advantage. For five years, the Government has provided those who supported the petition millions of dollars each year to pay for basic costs of operations, including the cost of equipment, facilities, training, health care and pension benefits, raw materials, and capital. *See* 19 U.S.C. § 1675c(b)(4) (2006). The example of Stanley Furniture Company again provides some perspective. In 2008, the company's CDSOA distribution covered the entirety of its capital expenditures, interest costs,

and income taxes, with more than $5 million left over to cover other expenses.[8]

These payments have allowed companies that engaged in Government-favored speech to invest more in capital improvements, machinery, and human resource development than they would have been able to absent the Byrd payments, even while their competitors (whose speech the Government disfavored) have struggled to maintain the level of investment needed to effectively compete in a challenging economic environment. Stanley Furniture Company's CEO has explained that the CDSOA payments have allowed the company to "reinvest in our people, processes and four manufacturing facilities, allowing us to ... grow our business." Heath E. Combs, *Duties Often Reinvested: Some Antidumpers Won't Comment*, FURNITURE TODAY, Apr. 22, 2007.[9] Likewise, Vaughan-Bassett Furniture Company has stated that it also spent its distributions on capital expenditures. *Id.* The company spent some $5 million of its CDSOA payments to develop a new quick-delivery system, while also making investments in new equipment (including new computerized routers), expanded warehouse capacity, and improved processes to deliver greater lumber yields. *Id.*

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[8] *See* Stanley 2008 Report (for 2008, reporting $2.261 million in capital expenditures, $3.211 million in interest costs, $998,000 in income taxes, and $11.485 million in CDSOA distributions).

[9] *Available at* http://www.furnituretoday.com/article/40835-Duties_often_reinvested.php.

Other recipients made similar investments. *See* Thomas Russell *Antidumping Duties Boost Incomes: Some Recipients Plan To Reinvest Money*, FURNITURE TODAY, Dec. 18, 2006 (Stickley Furniture also reported plans to increase spending on capital projects in the wake of receiving Byrd funds);[10] *id.* (CEO of Century Furniture stating that the funds were being spent "to make [the] business more competitive"); Heath E. Combs, *Smaller Duty Recipients Look To Capital Projects*, FURNITURE TODAY, Apr. 22, 2007 ("Manufacturers receiving smaller antidumping disbursements report the duties are helping them fund capital improvements.");[11] General Accounting Office, *International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act* 33 (Sep. 2005) (in survey of top CDSOA recipients one company reported using funds for "substantial investments in its factory and workers" while another found payments "helpful in justifying continued investment during periods when prices are depressed").[12]

Unless corrected, that competitive advantage will continue long after the distributions under the Byrd Amendment have ceased, as amici's competitors continue to enjoy the benefits of investments and

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[10] *Available at* http://www.furnituretoday.com/article/39056-Duties_boost_incomes.php.

[11] *Available at* http://www.furnituretoday.com/article/40860-Smaller_duty_recipients_look_to_capital_projects.php.

[12] *Available at* http://www.gao.gov/new.items/d05979.pdf.

capital improvements made in part with Byrd Amendment funds

II. The Court Of Appeals' Decision Is Wrong.

A. A Firm's Public Expression Of Support For, Or Opposition To, An Antidumping Investigation Is Entitled To Maximum First Amendment Protection.

Amici's disagreement with the Government's decision to impose the duties is precisely the kind of speech on issues of public interest the First Amendment was designed to protect. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, No. 08-205, slip op. at 25-26 (U.S. Jan. 21, 2010); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Calif.*, 475 U.S. 1, 8-9 (1986).

1. The antidumping petition proved highly controversial within the domestic furniture industry. One industry observer wrote at the time that the petition "is literally tearing the furniture industry apart." Rich Christianson, *Furniture Industry in Turmoil*, WOOD & WOOD PRODUCTS, Dec. 2003 (*Turmoil*).[13] The disagreements focused on some of the most essential political and economic debates of our times. For a number of years, globalization forced the domestic industry to face increased competition from manufacturers in other countries –

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[13] *Available at* http://woodworkingnetwork.com/Furniture-Industry-in-Turmoil/2006-10-12/Article.aspx?oid=961271&aid=79.

including China, Taiwan, India, and Indonesia – with plentiful low-cost labor. American firms took different approaches to that challenge. Some responded by seeking increased barriers to foreign imports, including by seeking the antidumping duties at issue in this case. Others responded by entering into joint ventures in China and elsewhere, producing some particularly labor-intensive furniture abroad while focusing domestic production on more capital-intensive lines of products. *See, e.g.*, Rich Christianson, *One on One: Sizing Up the Furniture Manufacturing Landscape*, WOOD & WOOD PRODUCTS, Mar. 2004 (*One on One*);[14] Stefan Wille, *Antidumping Petition Against the Chinese Furniture Industry: An Economist's Point of View*, WOOD & WOOD PRODUCTS, Oct. 2006 (*Economist's Point of View*) (noting that "[m]ost of the Chinese furniture exports to the United States stem from manufacturers with close ties to American buyers").[15] Thus, about half of the domestic firms responding to the Commission's questionnaire reported directly importing wooden bedroom furniture from China. ITC Report at IV-9 (twenty-six firms reported importing from China); *id.* at I-3 (forty-nine firms responded to questionnaire). This included several of the petitioning companies. *See* Transcript of ITC Hearing at 65-8, *Wooden*

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[14] *Available at* http://woodworkingnetwork.com/One-on-One-Sizing-Up-the-Furniture-Manufacturing-Landscape/2006-10-12/Article.aspx?oid=934451&aid=79.

[15] *Available at* http://woodworkingnetwork.com/Antidumping-Petition-Against-the-Chinese-Furniture-Industry-An-Economist-s-Point-of-View/2006-10-12/Article.aspx?oid=961057&aid=1648.

Bedroom Furniture from China, Inv. No. 731-TA-1058 (Nov. 9, 2004) (statements by representatives of Vaughan-Bassett, American of Martinsville, Bassett Furniture, Michels & Co. and Pilliod, Sandberg Furniture and Moosehead Manufacturing acknowledging present or past imports from China).[16] Indeed, Commissioner Hillman of the ITC herself highlighted this phenomenon, noting "the huge volume of imports by domestic producers and given the degree to which there has been this significant shift away from solely U.S. manufacturing." *Id.* at 149.

Domestic companies that responded to the competitive pressures of globalization by diversifying their production were less likely to support the petition. ITC Report at 29. Some doubted whether dumping was to blame for the low prices of Chinese furniture, noting that "the prices we are paying for products out of China are generally comparable to those being paid for products out of other countries in the Far East." Susan Lorimor, *Filing of Furniture Antidumping Petition Sparks Controversy*, WOOD & WOOD PRODUCTS, Nov. 2003 (*Petition Sparks Controversy*) (quoting industry executive);[17] *see also* Rich Christianson, *Furniture Antidumping Petition Gains Momentum*, WOOD & WOOD PRODUCTS, Aug. 2003 (quoting CEO of one domestic producer as saying that the "offshore producers with whom we do

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[16] *Available at* https://edis.usitc.gov.

[17] *Available at* http://woodworkingnetwork.com/Filing-of-Furniture-Antidumping-Petition-Sparks-Controversy/2006-10-12/Article.aspx?oid=961080&aid=1648.

business are well established and are people of integrity. We have no reason to believe they are engaged in any kind of activity that is unfair or illegal").[18] In addition, even the petition's supporters acknowledged that at least part of the problem was caused not by dumping, but by "China's manipulation of the yuan." *Petition Sparks Controversy*.

Domestic manufacturers further debated whether imposing duties on Chinese furniture would actually help the domestic industry. Some argued that increasing the cost of Chinese imports would simply lead companies to purchase similarly low-cost products from other nations, including Indonesia, India, and Vietnam. *See Furniture Manufacturers and Retailers Face Off*, WOOD & WOOD PRODUCTS, Dec. 2003 (*Face Off*).[19] In addition, some feared that imposition of duties could trigger a wider trade war with China, to the overall detriment to the domestic industry and general economy. *See Economist's Point of View*. And, obviously, increased costs of imports would hurt the bottom line of domestic companies that had made arrangements to manufacture some of their products or components in China. Many concluded that such arrangements were inevitable, if not with China, then with other developing countries. They argued that the petition would simply "distract

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[18] *Available at* http://woodworkingnetwork.com/Furniture-Antidumping-Petition-Gains-Momentum/2006-10-12/Article.aspx?oid=961277&aid=79.

[19] *Available at* http://woodworkingnetwork.com/Furniture-Manufacturers-and-Retailers-Face-Off/2006-10-12/Article.aspx?oid=961259&aid=79.

our industry from the real task of remaining competitive." *One on One.*

Domestic producers also had reason to be concerned that the petition would impair relationships with their retail partners, who strongly opposed it. *See Face Off.* Retailers argued that the duties would increase costs to consumers and depress general demand for all furniture (domestic and imported), leading to a loss of jobs in the retail sector and diminished sales to domestic producers in the long run. *See id.*; *Turmoil.* Retailers made a concerted effort to pressure domestic producers to withhold support from the petition. *See id.*; *see also* ITC Report H-3 (noting that a third of responding domestic producers reported that they had been told by customers that support for the petition "would affect [their] relationship with [the producer's] firm or would affect [their] purchases of wooden bedroom furniture from the firm"). A few large retailers went so far as to stop doing business with producers who supported the petition. *See Face Off* (noting that one retailer severed ties with a domestic manufacturer with whom it had done more than $1 million worth of business in the previous year); Congressional Research Service, THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT ("BYRD AMENDMENT") 24 (Dec. 19, 2005) (noting that "many U.S. furniture manufacturers in support of the investigation speculated that the cost of lost business from U.S. retailers in retaliation for their support may well exceed the combined benefit of the [antidumping]

order and CDSOA disbursements");[20] *Hooker Furniture Withdraws Support For Anti-Dumping Petition; Sites (sic) Industry Divisiveness As Cause*, RTO MAGAZINE, Feb. 16, 2004 (quoting executive of company that initially supported petition as explaining that it had withdrawn its support because "[w]hen we made the initial decision to support the petition, we had no idea how divisive this issue would become in our industry. If we had fully anticipated that, we would have been neutral from the start.").[21]

2. The speech rewarded and punished by the Byrd Amendment is core political speech entitled to the highest degree of First Amendment protection.

The debate within the furniture industry mirrored the broader political debate over the costs and benefits of the Byrd Amendment itself, which eventually led to its repeal. *See, e.g.*, Congressional Budget Office, ECONOMIC ANALYSIS OF THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000 (Mar. 2, 2004); Daniel Ikenson, *Byrd Boondoggle*, NATIONAL REVIEW ONLINE, Dec. 9, 2005;[22] Daniella Markheim, *Time to Repeal the Byrd Amendment*, THE HERITAGE FOUNDATION, Oct. 30, 2005.[23] The court of appeals' decision trivializes

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[20] *Available at http://digital.library.unt.edu/ark:/67531/metacrs8238/m1/1/high_res_d/.*

[21] *Available at* http://www.rtoonline.com/Content/Article/Feb04/HookerBails021604.asp.

[22] *Available at* http://article.nationalreview.com/?q=MzJkZTc4NDExNmUxMjA4NjQwZjNjOWY3ZDUwMWU1ZTE=

[23] *Available at* http://www.heritage.org/Research/tradeandeconomicfreedom/wm900.cfm.

these important public policy disagreements by equating them with ordinary "commercial speech," as if the firms were debating the best brand of mouthwash rather than the proper governmental response to the challenges of globalization. When corporations speak on matters of public concern, they are entitled to full First Amendment protection. *See, e.g.*, *Citizens United*, slip op. at 25-26; *Pac. Gas & Elec. Co.*, 475 U.S. at 8-9; *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 533-34 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775-86 (1978).

The court of appeals further erred in concluding that lesser protection was warranted because the statute does not ban opposition to the Government's decision to impose antidumping duties, but rather simply rewards those who supported that policy choice. *See* Pet. App. 28a. The Government may not offer financial rewards to those who support its position to impose antidumping duties any more than it may limit tax cuts to those who expressed political support for that policy. In either case, the Government's preferential treatment of those who support its actions invades the fundamental freedoms the First Amendment protects, and distorts the public debate that Amendment was designed to promote. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Citizens United*, slip op. at 26 (citation omitted). As a result, "[l]aws that burden political speech," be it the speech of individuals or corporations, "are subject to strict

scrutiny." *Id.* at 23 (citation and internal quotation marks omitted).

This is so even if, as the court of appeals assumed, Congress acted with a benign motive, rather than in an attempt to suppress dissent. *See* Pet. App. 28a-29a. As the Court recently made clear, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, slip op. at 23.

B. Neither The Government's Nor The Court Of Appeals' Post-Hoc Justification For The Byrd Amendment's Viewpoint Discrimination Withstands Scrutiny.

The court of appeals and the Government attempt to save a patently unconstitutional statute by hypothesizing that Congress intended to use speech as a proxy for something else. The Federal Circuit concluded that Congress was discriminating on the basis of viewpoint in order to draw distinctions between those who did, and did not, provide substantial assistance to the Government's investigation. Pet. App. 32a-33a. The Government, on the other hand, argued that Congress used support for the petition as a proxy for injury, assuming that only those who supported the petition suffered an injury from any unlawful trade practice eventually substantiated through the investigation. Pet. App. 29a-30a.

Even if either hypothesis were true, that would not save the statute – absent compelling justification, Congress may no more use viewpoint as a surrogate than it may use race as a proxy. Compare *Thompson*

v. W. States Med. Ctr., 535 U.S. 357, 370-73 (2002) (applying strict scrutiny to reject argument that Congress may use a corporation's decision to advertise a product as a "proxy for actual or intended large-scale manufacturing" of compound drugs) *with Johnson v. California*, 543 U.S. 499, 510-11 (2005) (prison regulation using race as a proxy for gang affiliation subject to strict scrutiny). Moreover, as discussed below, the Chinese wooden bedroom furniture investigation demonstrates that neither hypothesis is remotely plausible.

1. Public Expression Of Support For An Investigation Is Not A Proxy For The Level Of Assistance Provided To The ITC's Investigation.

The court of appeals upheld the statute on the assumption that "the purpose of the Byrd Amendment's limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings." Pet. App. 32a-33a. This, the court concluded, was generally consistent with Congress's desire to "strengthen enforcement of the trade laws," *id.*, but it could identify nothing more specific in the text or legislative history of the statute to support its hypothesized legislative purpose. *See id.* at 33-37a. In fact, the court of appeals' invented purpose is belied by the text of the statute and defies common sense.

The court of appeals recognized that its presumed statutory purpose was incompatible with the actual statutory text. Although the court

asserted that Congress intended to discriminate on the basis of viewpoint in order to ensure that only those who substantially assisted in the investigation benefitted from CDSOA distributions, the statute itself requires only that the person "indicate support of the petition *by letter* or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (2006) (emphasis added). Acknowledging that simply filing a letter of support would not assist the Commission in its investigation, the court of appeals judicially excised the offending language from the statute. Pet. App. 36a-37a n.26.

Yet even as rewritten, the statute does not distinguish between those who assist, or refuse to assist, the Commission's investigation. Firms providing exactly the same degree of assistance will either receive or be denied distribution based solely on whether they expressed support for the investigation. Indeed, the statute distinguishes even among those who actually support the petition by allowing distributions only for those who express that support *publicly*. *See* Pet. App. 15a n.9 (noting that although responses to the ITC questionnaire are otherwise confidential, firms are not entitled to Byrd funds unless they waive that confidentiality with respect to their support for the petition).

The court of appeals suggested that public expression of support nonetheless may be a rough proxy for active participation in the investigation. Pet. App. 32a-33a. But as petitioner has explained, *everyone* is required by law to provide the Commission requested information. *See* Pet. 4 (citing 19 U.S.C. § 1333(a) (2006); 19 C.F.R. § 207.8). And the court of appeals pointed to no evidence that those

who do not support the petition can be expected to defy that legal obligation. In the Chinese wooden bedroom furniture investigation, the Commission acknowledged that it received extensive cooperation from non-supporting firms. *See, e.g.*, ITC Report III-3, III-5. For example, amici Ashley Furniture Industries, Inc. and Standard Furniture Manufacturing Co. Ltd. each provided over 100 pages of submissions in response to ITC questionnaires.[24] And in its questionnaire response, Ashley estimated that it spent over 160 hours responding to the ITC's requests for information. Another domestic producer opposed to the petition, Furniture Brands International, Inc., submitted over 60 pages of briefing and related documents and testimony by a company executive.

In fact, in some areas, those who did not support the petition provided *more* information than those who did. For example, more than ten percent of the firms supporting the petition failed to produce requested information regarding capacity, production, and capacity utilization. *See* ITC Report at III-3. The ITC reported, however, that all of the firms opposing or taking no position on the petition provided the requested information. *Id.*

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[24] The confidential questionnaire responses are on file with the ITC.

2. There Is No Relationship Between Support For An Investigation And The Extent Of Harm Suffered.

The Government argued below that Congress limited disbursements to firms that supported a petition not because of any hostility toward those who expressed opposition to the investigation, but rather because Congress sought to use the firms' viewpoint as a proxy for injury suffered as a result of the unlawful dumping. As the court of appeals noted, there is no indication in the text or history of the statute that this was Congress's actual purpose. Pet. App. 29a-30a. Moreover, the Government's hypothesis is implausible on its face, as there is no ground to believe that a firm's position on the merits or wisdom of pursuing an antidumping investigation is an accurate indication of the degree of injury it suffered as a result of any illegal trade practices.

As discussed above, there were multiple legitimate grounds for firms to oppose the Chinese wooden bedroom furniture petition even if the opposing firm had been injured by unlawful competition. An injured firm could well believe that imposition of the duties would do no good because firms would simply start importing from Malaysia or Vietnam, rather than China. Despite suffering the ill-effects of Chinese imports, a firm could also fear that the antidumping investigation could lead to retaliatory action by China or other countries, as, in fact, happened in other cases. *See* Dispute Settlement, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217 (2003) (affirming decision authorizing retaliatory duties by ten countries and the European Union in response to

Byrd Amendment).[25] Further, a company could seek to avoid the inherent overall uncertainty and volatility that antidumping duties create in the marketplace. And firms could conclude that the benefit of the duties would be outweighed by the friction the imposition of antidumping duties would create between domestic producers and retailers, even if the firm was being injured by the imports.

As a result, there is no reason to believe that the Byrd Amendment's viewpoint discrimination results in a distribution of antidumping duties that is significantly correlated with the competitive injury. In fact, the firms that received 100 percent of the Byrd distributions produced only about one-third of pieces of furniture manufactured domestically at the time of the ITC investigation. *See* ITC Report at 17. Surely those who produce the other two-thirds of domestic furniture experienced at least *some* ill effect when faced with exactly the same competitive pressures from low-cost Chinese imports.

To be sure, the Commission found that opposing firms purchased more imports than the companies supporting the petition. ITC Report at 17-18. But the correlation was rough. In fact, some of the companies that supported the petition imported a greater percentage of their products from abroad than did those opposed it. For example, Stanley Furniture Company – which has received more than $31.5 million in Byrd funds[26] – has reported that

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[25] *Available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm.

[26] *See* reports cited in fn. 5.

"[a]pproximately 36% of [its] sales volume in 2008 came from products sourced offshore with The Peoples Republic of China . . . representing the largest volume."[27] In comparison, Furniture Brands International, which publicly opposed the petition and therefore was ineligible for any distributions, stated that at the time the petition was filed, its furniture was "75 percent domestically produced and 25 percent sourced" offshore. *One on One*.

In fact, the Commission found that opposing firms still produced the overwhelming majority of their furniture domestically, ITC Report at IV-13 (among opposing firms, imports represented, on average, less than a third of the companies' output). And the Commission found that importing domestic firms suffered a similar decline during the period in which it concluded that Chinese companies were illegally dumping their products in the domestic market. *See id.* at 27.

III. The Statute's Repeal Should Not Insulate The Court Of Appeals' Erroneous Decision From Review.

For the reasons described above, and in the petition, this case presents an important question of lasting significance worthy of this Court's attention. The fact that the challenged statute has been repealed is no reason to allow the decision to escape review. The Court has granted certiorari in the past

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[27] Stanley 2008 Report 4.

to resolve similarly important questions despite a change in the underlying legal landscape.

For example, the Court has repeatedly granted certiorari to interpret, or decide the constitutionality of, repealed statutes and regulations. As petitioner has noted, the Court granted certiorari to review the constitutionality of a superseded ordinance in *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974). *See id.* at 372 n.2. Similarly, in *Bryson v. United States*, 396 U.S. 64 (1969), this Court granted a petition challenging the validity of a conviction under a statute repealed a decade earlier. *Id.* at 65-66 & n.2. In *Astrup v. INS*, 402 U.S. 509 (1971), the Court decided the effect of Congress's repeal of an exemption from military service on an individual's right to apply for citizenship. And in *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224 (1959), the Court granted certiorari to decide whether repeal of a territorial tax statute extinguished tax liabilities that existed under the statute at the time of its repeal. In all of those cases, it could be argued that the repeal of the statute rendered any question about its continuing impact on a relatively small (and constantly diminishing) number of individuals unworthy of the Court's consideration. Nonetheless, the Court granted review.

Likewise, the Court has taken a number of cases to decide the retroactive effect of a change in the law, even though such questions have only a time-limited importance to a diminishing number of people. For example, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court decided whether certain provisions of the Civil Rights Act of 1991 applied to cases pending when the statute was enacted. *Id.* at

247. The Court has likewise granted review in other cases raising transitional questions about the repeal, amendment, or enactment of federal statutes. *See, e.g.*, *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (deciding whether provision of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 applied to individuals who re-entered the United States before the Act's effective date); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (reviewing whether Foreign Sovereign Immunities Act applied to conduct that occurred prior to its enactment); *INS v. St. Cyr*, 533 U.S. 289 (2001) (deciding whether changes in immigration law applied to individual convicted before effective dates of amendments); *Martin v. Hadix*, 527 U.S. 343 (1999) (deciding whether attorney's fee provision of the Prison Litigation Reform Act applied to legal services provided prior to Act's effective date); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (considering retroactive application of amendments to the False Claims Act); *United States v. Larionoff*, 431 U.S. 864 (1977) (deciding validity of a Navy regulation that retroactively changed the standards for providing re-enlistment bonuses); *see also Reich v. Collins*, 513 U.S. 106 (1994) (deciding the proper remedy for those denied tax refunds under an unconstitutional statute).

The petition in this case is no less worthy of this Court's review. Indeed, as petitioner explains, the court of appeals' decision here implicates not only the constitutionality of this particular legislation and the immediate interests of a wide range of industries, but also broader questions about the proper First

Amendment standards for evaluating governmental viewpoint discrimination with respect to corporate speakers. *See* Pet. 27-31. The repeal of the Byrd Amendment does nothing to correct the basic constitutional errors in the decision below, which will govern future decisions by the Federal Circuit in similar circumstances and risk sowing doctrinal confusion elsewhere as other courts look to this decision for guidance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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